

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2619

Cir. Ct. No. 2004CV1148

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN EX REL. CURTIS J. CELSKE,

PETITIONER-APPELLANT,

V.

**QUALA CHAMPAGNE, WARDEN, RACINE CORRECTIONAL
INSTITUTION, AND W. RICHARD CHIAPETE, ASSISTANT
DISTRICT ATTORNEY, RACINE COUNTY,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Racine County:
GERALD P. PTACEK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Curtis Celske appeals from a circuit court order quashing his petition for a writ of habeas corpus. Celske's petition challenged the

revocation of his probation and the assistance rendered by revocation counsel. We affirm.

¶2 An administrative law judge revoked Celske's probation for a 1992 burglary conviction in October 1998, and the Division of Hearings and Appeals affirmed the administrative law judge's revocation decision in December 1998. Celske did not timely file a petition for a writ of certiorari in the circuit court to review the probation revocation. In March 2004, Celske filed a petition for a writ of habeas corpus in the circuit court arguing inter alia that his revocation counsel was not effective during and after the revocation proceeding and that the Division of Hearings and Appeals violated his due process rights. After an evidentiary hearing, the circuit court concluded that challenges to the conduct of the Division of Hearings and Appeals should have been raised in a timely petition for a writ of certiorari and were not cognizable in a petition for a writ of habeas corpus. The court found that Celske did not timely file a certiorari petition or direct his counsel to do so, and that counsel was not ineffective. Celske appeals.

¶3 Whether habeas relief is available to a habeas petitioner presents a question of law that we review independently. *State v. Pozo*, 2002 WI App 279, ¶6, 258 Wis. 2d 796, 654 N.W.2d 12. We agree with the circuit court that Celske's petition for a writ of habeas corpus was not the appropriate vehicle for challenging aspects of the revocation proceeding.

A person aggrieved by an administrative decision and order to revoke his or her probation may have the revocation proceedings reviewed upon a timely petition to the circuit court for a writ of certiorari. Thus, an adequate remedy exists to address alleged defects in probation revocation proceedings, and relief under habeas corpus will not be granted. Since [the litigant's] allegations of error in the proceedings to revoke his probation are not properly before us, we do not reach the merits of his claims.

State ex rel. Reddin v. Galster, 215 Wis. 2d 179, 186-187, 572 N.W.2d 505 (Ct. App. 1997). Because Celske's challenges to the probation revocation proceeding and the Division's decision cannot be raised in a petition for a writ of habeas corpus, we do not consider them.

¶4 We turn to Celske's claim that his revocation counsel was ineffective. To the extent that Celske contends that his revocation counsel was ineffective for not timely filing a petition for a writ of certiorari, Celske cannot prevail. A revoked probationer does not have a right to the effective assistance of counsel to timely file a petition for a writ of certiorari to review the revocation. *State ex rel. Griffin v. Smith*, 2004 WI 36, ¶31, 270 Wis. 2d 235, 677 N.W.2d 259.

¶5 Even if Celske had a right to the effective assistance of counsel, Celske cannot prevail because the circuit court found that Celske did not timely direct his counsel to file a petition for a writ of certiorari.¹ We will affirm the circuit court's findings of fact if they are not clearly erroneous, and we defer to the circuit court's assessment of the credibility of the witnesses. *Village of Big Bend v. Anderson*, 103 Wis. 2d 403, 410, 308 N.W.2d 887 (Ct. App. 1981). The court's finding is not clearly erroneous based upon counsel's testimony at the evidentiary hearing on Celske's petition for a writ of habeas corpus.

¹ The petition for a writ of certiorari had to be filed within forty-five days of the decision of the Division of Hearings and Appeals affirming the administrative law judge's probation revocation decision. WIS. STAT. § 893.735(2) (1997-98). Counsel testified that Celske received a copy of the Division's decision which advised him of the forty-five-day period for filing a certiorari petition and that he and Celske discussed whether to file a certiorari petition. According to counsel, Celske was undecided about seeking certiorari review, and he did not request such review until after the forty-five-day period had expired.

¶6 We turn to Celske's claim that revocation counsel was ineffective during the revocation proceeding and that counsel prejudiced Celske's defense and denied him a fair hearing and due process. This claim may be raised via a habeas petition. *Reddin*, 215 Wis. 2d at 186.

¶7 At the evidentiary hearing, Celske did not question revocation counsel about anything other than counsel's failure to file a timely certiorari petition and to confirm that the administrative law judge in the 1998 revocation proceeding relied upon Celske's postprobation criminal conviction to revoke his probation.² As a matter of law, Celske's postprobation judgment of conviction is proof of a violation of the rules of probation. WIS. ADMIN. CODE § HA 2.05(6)(f) (Sept. 2001). Therefore, the administrative law judge did not err, and revocation counsel was not ineffective because he failed to object to the administrative law judge's reliance upon the conviction.³

¶8 No other aspect of revocation counsel's representation is properly before this court because Celske did not preserve counsel's testimony on any other issue at the evidentiary hearing on his habeas petition. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Even though we lack

² It is apparent from the transcript of the circuit court evidentiary hearing on his habeas petition that Celske does not understand how our reversal of his 1995 probation revocation could result in a 1998 revocation proceeding based on proof of a conviction which was not of record in 1995. We clarify as follows. Because a new hearing was held, new evidence was appropriate. Moreover, the new evidence consisted of a conviction for the offense which formed the basis for the 1995 probation revocation hearing. Therefore, only the form of the proof of the probation violation changed from 1995 to 1998.

³ The record does not contain the transcript of the 1998 probation revocation proceeding, so we will assume that revocation counsel did not object. Celske bore the responsibility for seeking inclusion in the appellate record of all documents needed for appeal. *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

revocation counsel's testimony and a transcript of the 1998 revocation proceeding, we question whether Celske can demonstrate that the administrative law judge in the 1998 probation revocation was biased. Evidence of Celske's conviction was properly before the administrative law judge and constituted a proper basis to revoke his probation.

¶9 Similarly lacking merit is Celske's claim that he was not actually on probation at the time of the 1998 revocation hearing because his probation expired prior to that hearing. Once the Department of Corrections commences an investigation or issues a violation report prior to the expiration of a term of probation, the Department of Corrections has jurisdiction over a probationer from that point forward. WIS. STAT. § 304.072(3) (1995-96). Notwithstanding the delay in reaching the 1998 probation revocation decision, Celske remained subject to probation revocation proceedings.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

